

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CINDY HALABURDA, individually  
and on behalf of all others  
similarly situated,

Plaintiff,

HONORABLE GEORGE CARAM STEEH

v.

No. 12-12831

BAUER PUBLISHING CO., LP, a  
Delaware Partnership,

Defendant.

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SETTLEMENT AGREEMENT

Monday, January 5, 2015

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APPEARANCES:

For the Plaintiff:

ARI J. SCHARG, ESQ.  
Assistant U.S. Attorney

For the Defendant:

SHARON SCHNEIER, ESQ.

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*To Obtain Certified Transcript, Contact:*  
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*Theodore Levin United States Courthouse*  
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*Detroit, Michigan 48226*  
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N O N E

Detroit, Michigan

Monday, January 5, 2015

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**THE CLERK:** Calling Case Number 12-12831,  
Cindy Halaburda versus Bauer Publishing.

**THE COURT:** Good morning.

**MR. SCHARG:** Good morning.

**MS. SCHNEIER:** Good morning.

**THE COURT:** Would you like to state your  
appearances?

**MR. SCHARG:** Ari Scharg on behalf of the  
plaintiff.

**MR. SUMMERFIELD:** Brian Summerfield on behalf  
of the plaintiff.

**MS. SCHNEIER:** Sharon Schneier on behalf of  
the plaintiff.

**MR. O'REILLY:** Arthur O'Reilly on behalf of  
the defendant.

**MS. SCHNEIER:** I'm sorry. On behalf of the  
defendant.

**THE COURT:** All right. Welcome.

This is the date and time established for the  
Court to review a proposed final settlement and  
professional fees, as well as an incentive award to the

*12-12831; CINDY HALABURDA v. BAUER PUBLISHING CO.*

1 plaintiff, and how would you like to proceed?

2 **MR. SCHARG:** Any way you would like. I could  
3 present the salient points to the Court.

4 **THE COURT:** All right. Come on up. Fine.

5 I'll note that this is a hearing established by  
6 the Court as part of its preliminary approval of the  
7 settlement, and that notice of this hearing was published  
8 to the putative class members in what fashion, Mr. Scharg?

9 **MR. SCHARG:** Notice was sent to them via  
10 mail, as well as email, and also published on the  
11 settlement website.

12 **THE COURT:** All right. And according to your  
13 papers, you have heard from some individuals, but received  
14 no objections, is that right?

15 **MR. SCHARG:** We've received no objections. I  
16 believe nine individuals have opt-out, and we've had an  
17 overwhelming positive response from the class members.

18 **THE COURT:** And the Court should note that  
19 there's no one here in the courtroom to voice an objection  
20 apparently.

21 **MR. SCHARG:** Correct.

22 **THE COURT:** You may proceed.

23 **MR. SCHARG:** As you noted, we're here on  
24 plaintiff's motion for final approval of the class action  
25 settlement involving violations of the Video Rental

1 Privacy Act.

2 The settlement that was preliminarily approved on  
3 September 26, 2014, provides excellent and meaningful  
4 recovery to the class. The defendant has established a  
5 \$775,000 non-reversionary settlement fund. From that  
6 settlement fund will be distributed pro rata to the class  
7 after claims, administration expenses, notice expenses,  
8 and attorney fees have been taken out.

9 I should note for the Court the claims deadline is  
10 February 19, 2015. So we still have claims coming in.

11 With respect to the prospective --

12 **THE COURT:** Do you have any rough idea of how  
13 many claims so far?.

14 **MR. SCHARG:** Right now there's about 9,500.

15 **THE COURT:** Okay. And if it ended with  
16 10,000, that would represent --

17 **MR. SCHARG:** Over 25 percent of the class.

18 **THE COURT:** Okay. And the pro rata  
19 distribution -- let's assume your attorney fees are  
20 awarded as requested and the incentive award is recorded  
21 as requested, what would that roughly translate to?

22 **MR. SCHARG:** About \$74 per class member.

23 **THE COURT:** All right.

24 **MR. SCHARG:** With respect to the prospective  
25 relief, at first we contemplated a couple of different

1 modifications to the defense practices. There's going to  
2 be the implementation of an online privacy policy. They  
3 will comply with opt-out requests within 30 days, and they  
4 would notify new customers of their privacy policy.

5 Recently we were contacted by the Michigan  
6 Attorney General Office. We've been working with them  
7 along with the defendant, and what they've requested is a  
8 modification to the settlement that required the defendant  
9 to stop disclosing their Michigan customer information for  
10 the next four years, and the defendant has agreed to  
11 comply with that. That was always an option that was  
12 there under the settlement. They could either not  
13 disclose, or they could post the privacy policy, notify  
14 people of the disclosure, but they are opting not to  
15 disclose, and that change will also be reflected in the  
16 final approval order.

17 **THE COURT:** I see. How is oversight of the  
18 equitable relief that is provided going to occur?

19 **MR. SCHARG:** Well, they've -- the defendant  
20 has pledged not to disclose any customer information for  
21 the next four years. They're going to stop what we allege  
22 they were doing wrong.

23 **THE COURT:** And so again, oversight would be  
24 achieved just by --

25 **MR. SCHARG:** Well, through the

1 representations of counsel. I mean, we're still  
2 investigating getting the entire industry. So we don't  
3 expect to see any disclosures from Bauer being made, but  
4 to the extent we do, it will be a phone call to their  
5 attorneys right away to advise them of what's going on,  
6 but we've discussed it at length with Bauer and their  
7 attorneys, and we're comfortable that they're getting out  
8 of the business for the next couple years.

9 **THE COURT:** Four years.

10 **MR. SCHARG:** Four years.

11 **THE COURT:** Okay.

12 **MR. SCHARG:** At that point it will be up to  
13 them whether they even want to get back into it or not.  
14 We will be watching. If they do, it will start a new  
15 violation of the Video Privacy Protection Act. That's our  
16 contention. So I don't think that they'll be disclosing  
17 in the future, but we'll keep an eye out if they do.

18 **THE COURT:** Okay.

19 **MR. SCHARG:** I'm happy to report that the  
20 notice plan was successfully implemented. Epiq was  
21 appointed class action administrator. They sent physical  
22 postcards and emails out to all the class members. The  
23 reach was 94 percent of the class. There were a couple of  
24 addresses that were no longer valid, and a couple of email  
25 addresses that were no longer valid. For those, they



1 attempted to remail the postcards and re-email the  
2 electronic notice. Some of those did go through, but some  
3 of them did not, but the 94 percent far surpasses the  
4 percentage that was endorsed by the Federal Judicial  
5 Center, which was 70 percent.

6 In addition to that, there's a settlement website  
7 that went live 10 days after the preliminary approval.  
8 That website essentially is an online resource where class  
9 members can submit electronic claims. They can review in  
10 court -- important court filings. They can review the  
11 deadlines. They can review all of the preliminary and  
12 final approval papers, as well as our fee petition. We  
13 posted that to the settlement website 14 days before the  
14 objection deadline, and, of course, we also sent out CAFA  
15 notice within 10 days after the settlement was filed with  
16 the Court.

17 So beyond that, if there are any other questions  
18 that I can answer to the Court or take you through any  
19 other issues with the settlement --

20 **THE COURT:** So the statute provides for an  
21 incentive award of up to \$5,000. You're asking for  
22 \$5,000, and you also acknowledge that there has not been  
23 an extensive amount of formal discovery undertaken. So  
24 I'm wondering what do you believe would justify the  
25 maximum award as an incentive award to the named

1 plaintiff, Ms. Halaburda?

2 **MR. SCHARG:** Well, the named plaintiff has  
3 been involved in the case for the past two and a half  
4 years. In fact, she was one of the driving forces behind  
5 the case. She brought the issue to our attention with  
6 respect to this defendant. She had been involved in the  
7 issuing of discovery. We did issue it in discovery, and  
8 her involvement was critical during the negotiation of the  
9 settlement. She had ideas with respect to the prospective  
10 relief, as well as what should go on the claim form,  
11 including giving people to opportunity to opt-out of the  
12 disclosures through the claim form. She's been involved.  
13 She's been the energy behind the case.

14 For those reasons, I would ask that the Court  
15 award her the \$5,000 incentive award.

16 **THE COURT:** Okay. All right. Thank you.

17 **MR. SCHARG:** Thank you very much.

18 **THE COURT:** On behalf of defendants?

19 **MR. SCHARG:** Would you like me to address the  
20 fee petition as well?

21 **THE COURT:** The attorney fees, sure.

22 **MR. SCHARG:** Okay. It's a non-reversionary  
23 settlement fund, and for that reason we've asked the Court  
24 to approve fees of 30 percent. Additional percentages  
25 have been approved. Lower percentages have been approved.

1 Thirty percent seems to be in the middle. With respect to  
2 a crosscheck against our Lodestar, it's pretty close.  
3 It's only a 1.1 multiplier. I believe that our Lodestar  
4 base was around \$205,000, and I think we're asking for  
5 \$230,500.

6 **THE COURT:** Okay.

7 **MR. SCHARG:** Thank you very much.

8 **THE COURT:** On behalf of the defense?

9 **MS. SCHNEIER:** Your Honor, I don't really  
10 have much to add unless the Court has questions for me.

11 **THE COURT:** Well again, my only question  
12 really was, there's no mechanism established for  
13 monitoring compliance with the equitable relief that is  
14 proposed here. Should I be comfortable with that?

15 **MS. SCHNEIER:** I understand the Court's  
16 concern. Obviously, that was our concern as well, and  
17 it's I would say two things that might give the Court  
18 comfort.

19 The vast bulk of Bauer's sales come from  
20 newsstands, not through subscriptions. So it's a fairly  
21 confined universe, and very clearly defined people who  
22 would be involved. It is a very small group.

23 I have been on phone with them. I'm comfortable.  
24 Obviously, we -- we have negotiated this, you know, for  
25 quite a long time and very carefully, and making sure that

1 we comply with the Court's order, and from my client's  
2 perspective, you know, making sure that we're not going to  
3 have any further allegations that we've violated the  
4 statute is of paramount importance.

5 So given the limited scope of Bauer's business in  
6 this area, I feel comfortable that we will be able to  
7 monitor it, and we have already shut it down, and there  
8 have been no issues.

9 **THE COURT:** Should I be concerned about the  
10 variance between the -- the modification that's called for  
11 by the attorney general's involvement and the form of the  
12 proposed settlement agreement before that involvement?

13 **MS. SCHNEIER:** I --

14 **THE COURT:** I gather as a result of  
15 interaction with the attorney general's office, there's an  
16 agreement for a period of four years not to allow any  
17 personal information to me. What's it called, personal  
18 reading?

19 **MS. SCHNEIER:** It's not defined under the  
20 statute. We refer to it as personal reading information.

21 **THE COURT:** Right. Not to be disclosed, and  
22 then is it that the agreement is going to be modified to  
23 provide that, but after four years if you undertake to  
24 disclose, you'll be required to post the privacy notices  
25 explaining that?

1                   **MS. SCHNEIER:** Well, actually we have already  
2 modified our online privacy policy to lessons learned from  
3 here to have, you know, better practices. We've already  
4 done that, but after four years if we decide to begin the  
5 disclosures that are contemplated with the statute, we  
6 have to comply with the statute. The statute provides for  
7 certain exceptions, most of which are built into the  
8 prospective relief that has been negotiated, some of which  
9 we have voluntarily undertaken any way.

10                   The -- the discussions with the AG's office really  
11 caused us to affirmatively represent what was already  
12 provided for in the statute, which was we were given the  
13 option of not -- of not making any further disclosures,  
14 and what we agreed was given how the discussion was going  
15 to just say that's -- that is what we're going to do.  
16 We're going to make a representation that that is what  
17 we're going to do and that satisfied the attorney general.

18                   **THE COURT:** All right. Very fine. Thank  
19 you.

20                   **MS. SCHNEIER:** Thank you, your Honor.

21                   **THE COURT:** Well, the Court today, based upon  
22 the papers that has been submitted, as well as the  
23 statements here on the record, is prepared to grant the  
24 motion for final settlement approval.

25                   The -- the Court can conclude from the submissions

1       that the preliminary approval is -- as concluded by the  
2       preliminary approval, the Court is satisfied that the Rule  
3       of 23(a) requirements have been met.

4               The settlement class is comprised of about 23,000  
5       individuals, and is obviously numerous enough that the  
6       joinder of all members are -- would be impractical, and  
7       the numerosity requirement is therefore met.

8               The commonality requirement in Rule 26(a)(2) is  
9       also met given the common questions of fact and law, which  
10      include whether defendant obtained consent prior to  
11      disclosing the magazine subscription information at issue  
12      to third parties, whether the defendant notified plaintiff  
13      in the settlement class members that such information  
14      would be disclosed, and whether the defendant's disclosure  
15      of plaintiffs and settlement class members magazine  
16      subscription information violated the Michigan Video  
17      Rental Privacy Act, and lastly, whether the plaintiff and  
18      settlement class members are entitled to the statutory  
19      damages provided for by the Video Rental Privacy Act.

20              The Court concludes then that the commonality  
21      requirement is likewise met.

22              As it relates to typicality given that all of the  
23      claims arise from the same course of conduct, the Court is  
24      convinced that the requirement of Rule 26(a)(3) has been  
25      established, and lastly, that the requirement of adequacy

1 is satisfied by the -- by both criteria that commonly are  
2 applied by the Court to make that assessment.

3 First, that the class representative Ms.  
4 Halaburda, has common interest with the unnamed members of  
5 class, and second, that the representative vigorously  
6 prosecuted the interest of the class through qualified  
7 counsel.

8 The Court is to assess the predominance factor  
9 that is likewise a part of Rule 26(a), and can determine  
10 that the class members claims are based on the same set of  
11 facts by disclosure of magazine subscription information  
12 carrying essentially the same legal claims that are  
13 covered by the RPA, and the -- and that the class action  
14 claims here are superior to other methods fair and  
15 efficient adjudication of a controversy.

16 As it relates to this proposed class action  
17 settlement agreement, the Court is to assess whether the  
18 terms proposed are fair, adequate and reasonable to those  
19 it affects, and in the public interest.

20 The Court is to consider whether the interest of  
21 the class as a whole are better served by the settlement  
22 of the litigation rather than pursue through further  
23 litigation, and -- and is to assess several factors that  
24 have been established by the Sixth Circuit to guide the  
25 inquiry into whether the final settlement is fair and

1 reasonable.

2 The first is the risk of fraud or collusion, and  
3 in this case there is no evidence of fraud or collusion  
4 and the presumption as established by the Sixth Circuit is  
5 that, therefore, there is none. There is no fraud or  
6 collusion.

7 The complexity expense and likely duration of the  
8 litigation is to be considered by the Court. This case  
9 has been pending for over two years. It involves claims  
10 that were heard as matter of first impression in our  
11 circuit at least, if not in the country, and the Court in  
12 earlier rulings found that the statute does apply to  
13 magazines, which was an issue advanced that the case  
14 should not be dismissed as the Court was asked to do by  
15 the defense based upon its argument that subscribers had  
16 consented to the disclosure of their subscription  
17 information based upon privacy policy.

18 There are significant risks here that given  
19 continuing litigation, there is significant possibility  
20 that the ultimate outcome would have been little to no  
21 recovery for the plaintiff, and the Court is satisfied  
22 that while there has been not a great deal of formal  
23 discovery, there was a good deal of exchange between the  
24 parties conducting discovery informally over this period  
25 of time.



1           The Court is satisfied that the defendant has  
2 provided plaintiff counsel with enough information to  
3 conclude that the settlement as proposed is in the best  
4 interest of settlement class, and here, the Court is  
5 satisfied that the parties are using the proposed  
6 settlement to resolve legitimate legal and factual  
7 disputes that is more or less identified in the summary  
8 and are more fully described in the parties papers.

9           The Court is likewise satisfied that class  
10 counsel, as well as defense counsel here, is experienced  
11 in litigating class action disputes that are at least  
12 similar in size, scope and complexity, that their request  
13 for approval of the settlement based upon their assessment  
14 that the settlement is fair, reasonable and adequate can  
15 be accepted by the Court that the settlement itself was  
16 negotiated at arm's-length over a period of months.

17           The Court is also impressed that there has been a  
18 generally positive reaction from the class members, that  
19 while some have opted out of the class, there have been no  
20 objections made to the settlement among the approximately  
21 23,000 putative class members.

22           The Court is satisfied as well that public  
23 interest favors approving the final settlement agreement.  
24 As the plaintiff has pointed out in her motion, the  
25 settlement is aligned with the objections of the statute,

1 and given the review and participation by the state  
2 attorney general and its input into the final settlement  
3 agreement as described on the record, the Court is  
4 satisfied that the public interest favors approval.

5 As it relates to the attorney fees, the Court is  
6 persuaded that the request for an award of attorney fees  
7 of 232,500 as representing 30 percent of the common class  
8 fund is a reasonable request in accordance with the fee  
9 agreement originally negotiated, and a fair sum in light  
10 of the risks that the Court has previously discussed of no  
11 recovery at all, that the -- that the Lodestar calculation  
12 results in a similar sum, and -- and that again, there  
13 have been no objections made after notice to the class  
14 members.

15 The Court is also aware the incentive award of  
16 \$5,000 to Ms. Halaburda is reasonably modest, and  
17 commensurate with the role that she played in the  
18 litigation.

19 While the ultimate distribution of the damages  
20 award -- well, it's, in fact, the statutory damages  
21 awarded as a part of this settlement agreement -- while  
22 that sum is relatively modest and almost to the point of  
23 being nominal, it is again commensurate with the  
24 experience I think of the class members as a whole, and  
25 who would be unable to establish actual damages, and who

1 might be characterized as having suffered the annoyance of  
2 the disclosure of the personal reading information and a  
3 little more than that.

4 So had this case proceeded to judgment against the  
5 defendant, it seems likely to the Court that the award to  
6 individual plaintiffs would have been nominal, and that  
7 the more important provisions of the settlement agreement  
8 are the provisions according equitable relief and a  
9 cessation of the disclosure altogether for this period of  
10 four years by the defendants.

11 So the Court is satisfied that the settlement  
12 agreement as a whole is appropriate. I understand that  
13 there is yet a modification of that award in accordance  
14 with this outright cessation of four years that needs to  
15 be completed and returned to the Court before that is  
16 ultimately ordered, is that right?

17 **MR. SCHARG:** Yes, we did include it in the  
18 proposed final approval order, but as we were speaking  
19 outside just before we walked in, we need to make a couple  
20 of changes to the final approval order itself. So we can  
21 do it by the end of the day.

22 **THE COURT:** All right.

23 **MR. SCHARG:** And send it to the chambers.

24 **THE COURT:** Okay. That will be fine, and  
25 we'll enter that as requested. You can fill in the blanks

1 on the awards, and we'll --

2 **MR. SCHARG:** If I could make one more note.

3 **THE COURT:** Yes.

4 **MR. SCHARG:** In the final approval motion,  
5 the declaration attached to it, we corrected that there  
6 were actually about 40,000 class members, and I just want  
7 the Court --

8 **THE COURT:** Not 23?

9 **MR. SCHARG:** Not 23. I just want the Court  
10 to be aware of that.

11 Thank you for your assistance.

12 **THE COURT:** That's more suitable under the  
13 numerosity requirement.

14 **MR. SCHARG:** Yes.

15 **THE COURT:** Okay. Very good. We'll enter  
16 that when you get it to us later today.

17 **MR. SCHARG:** Thank you.

18 **MS. SCHNEIER:** Thank you, your Honor.

19

20 (Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

\_\_\_\_\_  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

\_\_\_\_\_  
Date

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